



Mercy Medical Center



We urge the adoption of LC 31 which is consensus language on liability protections for health care providers during the COVID-19 emergency.

In response to the COVID-19 pandemic, many health care providers had to alter their normal standard of care for reasons that are outside of their control—including the Governor’s Executive Orders banning non-emergency care. The limited liability protections for health care providers in LC 31 do not apply to cases of gross negligence or reckless misconduct and are limited to the period of the COVID-19 emergency. The narrow exemption within the bill also does not protect a health care provider from claims based on discrimination of a patient.

Frontline health care providers have been critical partners throughout this pandemic, responding to patient needs and keeping up with ever-changing, and at times conflicting, guidance and executive orders. Healthcare providers have been working day and night to flatten the curve and to keep people healthy.

Since June, under the direction of Senate Judiciary Chair, Senator Floyd Prozanski, a work group of the Oregon Medical Association, the Oregon Association of Hospitals and Health Systems, and the Oregon Trial Lawyers Association worked diligently to reach consensus on a framework that is narrowly tailored to provide some reasonable protection for health care providers when they follow government-imposed COVID-19 rules and executive orders that impact the delivery of health care.

In other words, if those government-imposed COVID-19 rules shifted the standard of care, health care providers should be able to point that out in a legal proceeding and explain that they followed those rules.

As mentioned above, this framework is not what we hear about as “blanket” immunity. Further, the framework does not take away access to the courts or infringe on any other rights that are not narrowly within our consensus language.

The scope of this bill is limited to addressing standard of care issues. The work group purposely did not address employment issues or issues with long term care settings. Those discussions are occurring in different venues with the appropriate stakeholders. This discussion was limited and narrowed.

We are thankful to Senator Prozanski, Representative Powers and many others that have been working on these complicated and difficult issue during this difficult time.

Oregon health care provides are exhausted, often times risking their lives to help others. They need the Oregon Legislature to pass LC 31 to provide them some sense of security that they won't be sued for following the emergency rules. Our members have been protecting us from day one. Now we need you to protect them.

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LC 31 – MEDICAL LIABILITY PROTECTIONS

LC 31 is the result of several months of effort on the part of a workgroup convened by Senator Floyd Prozanski that included representatives from the Oregon Association of Hospitals and Health Systems, Oregon Medical Association and Oregon Trial Lawyers Association. This consensus proposal creates a framework for liability protections, subject to exceptions, for medical providers for acts or omissions performed in the course of rendering health care services and in order to comply with COVID-19 emergency rules.

Section 1: DEFINITIONS

Section 1 contains a number of important definitions that focus on the specific scope of protections and identify providers that are covered by the medical liability protection framework outlined in the legislation. These include:

- COVID-19 emergency period: The period of time in which any declaration of a state of emergency issued by the Governor related to COVID-19, and any extension of the declaration, is in effect.
- COVID-19 emergency rule: an executive order, order of the Public Health Director, declaration, directive or other state or federal authorization, policy, statement, guidance, rule or regulation that creates a standard or waives, suspends or modifies otherwise applicable state or federal law, regulations or standards regarding the rendering of health care services, including those regarding the standard of care during the COVID-19 emergency period and use of telemedicine during the COVID-19 emergency period.
- Health care provider: Health care provider means a physician, advance practice registered nurse, physician assistant, dentist, or dental hygienist, each defined under current Oregon law.
- Health care services: Health care services means supplies and services, including services provided by telemedicine, provided by a hospital, health maintenance organization or health care provided in a location other than a long term care facility, a residential care facility, an establishment furnishing primarily domiciliary care or a facility licensed or approved under the Department of Corrections that involve the:
 - Treatment, diagnosis, prevention or mitigation of COVID-19;
 - Assessment or care of an individual with a confirmed or suspected case of COVID-19; or
 - Care of any other individual who presents at a hospital or to a health maintenance organization or health care provider during the COVID-19 emergency period and during a time when COVID-19 emergency rules are in effect.

The definition applies to health care services provided during the COVID-19 emergency period and during a time when COVID-19 emergency rules are in effect as those rules affected care beyond the treatment of COVID-19.

- Health maintenance organization: Health maintenance organization applies to Kaiser and is defined by reference to current Oregon law (ORS 750.005).
- Hospital: Hospital has the meaning given that term in ORS 442.015 and includes hospital satellites and any location where the Oregon Health Authority allows hospital services to be provided during the COVID-19 emergency period, including but not limited to temporarily licensed additional hospital space on-campus or off-campus and temporary or mobile on-campus locations.

- Telemedicine: Telemedicine means the provision of health care services to a patient by a health care provider from a distance using electronic communications, including synchronous audio and video communication, audio-only telephone communication, store-and-forward technology or any other form of two-way electronic communication.

Section 2: LIABILITY PROTECTION AND EXCEPTIONS TO PROTECTION

Section 2(1) prohibits a person from bringing a claim against a hospital, a health maintenance organization, a health care provider or a location where health care services are provided arising from acts or omissions performed in the course of rendering health care services and in order to comply with COVID-19 emergency rules in effect at the time of the act or omission.

Section 2(2) identifies exceptions to the liability protections. The exceptions exclude from liability protections acts or omissions constituting gross negligence; reckless, wanton or intentional misconduct; false claims actions brought by or on behalf of the state; fraud; deceptive acts or practices; and certain acts related to Executive Order 20-10, which is the Governor's Executive Order directing hospitals and other providers to cancel or delay elective and nonurgent procedures that utilize personal protective equipment, unless the irreversible harm exemption applied.

The exception related to Executive Order 20-10 is Section 2(2)(f). This exception to the liability protections is meant to leave the liability protections in place for many of the acts or omissions taken pursuant to Executive Order 20-10 and remove from the protections only those acts or omissions to delay or cancel that put a patient at risk of irreversible harm based on the medical evidence available at the time of the delay or cancellation.

The liability protections do not limit any other cause of action or remedy available to any person, including any action for whistleblower protections or discrimination. Any action or remedy that a person has available under current law for whistleblower protections or discrimination will remain available to the person.

Section 3: EARLY RESOLUTION PROVISIONS

Section 3 contains a special procedure that may be followed to seek efficient early resolution of one or more claims in a lawsuit. The goal is to create an early off-ramp so that some claims may be resolved before the parties' exchange information and take depositions, which can be time consuming and expensive.

We expect that a limited number of claims will be resolved through this special procedure. If a claim is not resolved through this special procedure, the lawsuit will remain until it is eventually resolved through the standard procedures, such as a trial.

A party seeking liability protections (e.g., a physician) may choose to try to resolve one or more claims through the special procedure. Under the special procedure, the party (e.g., physician) has the initial responsibility to show that the claim is barred by the immunity protections

identified in Section 2(1) of the legislation. For example, the physician may describe the important facts and explain the actions that the physician took in order to comply with the applicable COVID-19 emergency rule.

If the physician does that, the plaintiff (e.g., patient) would then have the responsibility to describe important facts showing that the physician's actions were not taken in order to comply with the applicable COVID-19 emergency rule.

Each party has the opportunity to present sworn testimony in an affidavit to the court. The Judge will consider only those affidavits and the pleadings, such as the patient's claims filed with the court. In cases where important facts regarding a claim are disputed, the Judge will not dismiss the claim at that time and the lawsuit will continue.

Section 4: PERIOD QUALIFYING FOR LIABILITY PROTECTIONS

Section 4 specifies that this Act applies to claims arising from acts or omissions that occur during the emergency period. The liability protections should apply even if such claims are discovered after the emergency period has ended.

Section 5: EMERGENCY CLAUSE

Section 5 specifies that this Act will take effect on its passage.